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HAROLD B. WILLEY,

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1954

No. 379

EARL WEBB, AS PRESIDENT OF SIGMA TAU GAMMA, AN UNINCORPORATED ASSOCIATION, ETC., ET AL.,

Appellants,

v.

STATE UNIVERSITY OF NEW YORK, WILLIAM S. CARLSON, PRESIDENT, CHARLES GARSIDE, ET AL., ETC.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF NEW YORK

STATEMENT AS TO JURISDICTION

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UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF NEW YORK

EARL WEBB, as President of SIGMA TAU GAMMA, an unincorporated Association, and all others similarly situated, and DELTA KAPPA, INC., PHI SIGMA EPSILON, ALUMNI ASSOCIATION OF IOTA OF ALPHA KAPPA KAPPA, INC., PI KAPPA SIGMA, DELTA SIGMA EPSILON SORORITY, ALPHA SIGMA TAU SORORITY, THETA SIGMA UPSILON SORORITY and ROGER MUELLER, as Intervenors,

Appellants,

against

STATE UNIVERSITY OF NEW YORK, WILLIAM S. CARLSON, President; CHARLES GARSIDE, BETTY HAWLEY DONNELLY, NORMAN S. GOETZ, FREDERICK F. GREENMAN, GEORGE E. HAYNES, DWIGHT MARVIN, EARLE J. MACHOLD, FRANK C. MORRE, JOSEPH J. MYLER, EDWARD N. SCHEIBERLING, HENRY D. SHERWOOD, and EMILY SMITH WARNER, Comprising the Trustees of STATE UNIVERSITY OF NEW YORK,

Appellees

Civil Action No. 5063

Appeal from the United States District Court for the Northern District of New York.

Statement of Basis on which Appellants Contend the Supreme Court of the United States has Jurisdiction to Review on Appeal the Judgment of dismissal and order Appealed from, as Required by Supreme Court Rule 12.

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Pursuant to Supreme Court Rule 12, par. 1, Earl Webb, as President of Sigma Tau Gamma, an unincorporated Association, and all others similarly situated etc., the above appellants, files this, his and its statement particularly disclosing the basis on which appellants contend that the Supreme Court has appellate jurisdiction to review on appeal the judgment appealed from herein, as follows:

I

Statute Sustaining Jurisdiction

The statutory provision believed to sustain appellate jurisdiction is Section 1253 of Title 28 of the United States Code, which provides that:

> § 1253. Direct appeals from the decision of three-judge courts.
>
> "Except as otherwise provided by law, any party may appeal to the Supreme Court from an order granting or denying, after notice and hearing, an interlocutory or permanent injunction in any civil action, suit or proceeding required by any Act of Congress to be heard and determined by a District Court of three judges."

Also Sections 2101, 2281, and 2284 of Title 28 U. S. C.

II

Statute, the Validity of which is involved.

The statute of the State of New York, the validity of which is involved, is Section 355 of the Education Law of the State of New York, being embodied in Chapter 734, Laws of New York of 1951, as follows:

> "§ 355. Power and duties of Trustees—Administrative functions.
>
> "2. The state university trustees are further authorized and empowered, subject to the general supervision and approval of the Board of Regents:

"b. To make and establish and from time to time alter and amend such rules and regulations not inconsistent with law, for the government of the state university and the institutions therein.

"This act shall take effect immediately."

The same provision was incorporated in § 355 as amended by Chapter 525, Laws of 1953, of the State of New York, and the amendment provided:

"8. This act shall take effect September first, nineteen hundred fifty-three."

III

1. The judgment appealed from was entered in the office of the Clerk of the District Court for the Northern District of New York on the 7th day of June, 1954.

2. The application for an appeal herein was presented on the 25 day of June, 1954.

IV

Nature of Case and Rulings of Court to Bring Case Within Jurisdictional Provisions Relied on.

1. The appeal herein is from a judgment of dismissal of a three-judge District Court in which an interlocutory or permanent injunction was prayed for in Civil Case Docket Number 5063 to restrain the enforcement of a resolution passed by the Trustees of State University of New York on the 8th day of October, 1953, banning all national affiliation of social fraternities at state colleges and for a declaratory judgment.

2. The rulings of the Court were such as to bring the case within the jurisdictional provisions relied on, in that Section 1253, Article 28, United States Code, provides that

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an appeal may be taken from any such court in such a case direct to the Supreme Court of the United States.

3. The cases believed to sustain the jurisdiction are as follows:

a. *Harkness* v. *Irion*, 278 U. S. 92;
b. *Interestate Busses Corporation* v. *Blodgett*, 276 U. S. 245;
c. *Radio Corporation of America* v. *United States*, 341 U. S. 412;
d. *Lee* v. *Roseberry*, 200 F. (2d) 155.

V

Grounds for Contention that Questions Involved are Substantial.

The grounds upon which it is contended the questions involved are substantial are that the entire college fraternity system in America is believed to be at stake; the action on the part of the Trustees of State University, and the method employed, is unreasonable, arbitrary and capricious; it interferes with the constitutional guarantee of free assembly, is violative of the provisions of Article 1 of the Bill of Rights, and would seem to deprive fraternities of any right of being heard, and deprives them of property without due process of law, in violation of guarantees provided in the 14th Amendment.

Plaintiffs further contend the three-judge court erred in that part of their decision wherein they stated "lack of notice and hearing before adoption of a resolution by an administrative body is not a denial of due process where legislative action of a prospective nature is taken under a valid delegation of powers from the legislature. See *Willapoint Oysters* v. *Ewing*, 174 F. 2d 676, 694, (9th Cir.), cert. den. 338 U. S. 860." That part of the opinion referred to is simply dicta. It refers only to some inconsiderate portion of an order of a Board. In the instant case thou-

sands of dollars worth of property is affected. Such a construction as adopted by the three-judge court is fairly arguable, as contained in the opinions of the New York Court of Appeals in *Matter of Weekes* v. *O'Connell*, 304 N. Y. 259.

See In re *Federal Tel. & Radio Corp.*, 301 N. Y. 95. A fundamental principle of due process is the opportunity to be heard, *Grannis* v. *Ordean*, 234 U. S. 385; *Milliken* v. *Meyer*, 311 U. S. 457; *Prust* v. *Board of Trustees*, 232 U. S. 604. The opinion of the three-judge court does not question jurisdiction; it must therefore be assumed to exist. It was the duty of the court to pass on this question. *Joyner et al.* v. *Browning et al*, 30 Fed. Supp. 512.

Where plaintiff sues in a class action, the aggregate claims of plaintiff and all interveners must be considered in passing on jurisdiction. *Risley* v. *City of Utica*, 168 F. 168.

The opinion of the three-judge court cited *Waugh* v. *Mississippi University*, 237 U. S. 589; *Hughes* v. *Caddo Parish School Bd.*, 57 Fed. Supp. 508, aff'd 323 U. S. 685, and *Hamilton* v. *Regents*, 293 U. S. 245.

In the Waugh case the legislature had by act banned fraternities, but there a distinction was made as to the students then in college and those who had graduated, the ins and outs. In the instant case this was not done, as shown by plaintiff's exhibit, demanding that no students be pledged or initiated after January '54.

In the Hughes case there was an enabling act of the legislature and an opportunity to be heard.

In the Hamliton case the college was granted land on condition that military training be followed by students. Plaintiffs were conscientious objectors. The Board of Regents in conformity to the grant required the students to take a course in military training. The court properly re-

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quired this to be done. This decision confirms plaintiff's contention.

The Appellant appends hereto a copy of the opinions delivered in this cause by the three-judge District Court, as well as of the District Court in referring the matter to a three-judge court.

VI

As this is an appeal from denial of an interlocutory decree of a specially constituted District Court of the United States, it is claimed the Court abused its discretion in denying said interlocutory injunction for the following reasons:

The holding that the provisions of the "Education Law" granted to the Trustees the power to abolish fraternities was directly contrary to the great weight of established law. The legislature only could accomplish this. No implied approval could be assumed from the Board of Regents.

The undersigned is cognizant of the opinion of the Supreme Court of the United States in *Alabama* v. *United* States, 279 U. S. 229, to effect that this court will not reverse a decision of the lower court based on the exercise of discretion, unless such discretion was improvidently exercised.

Mr. Judge James T. Foley, in his opinion of April 27, 1954, now a member of the three-judge court, stated as follows:

> "Most significant, however, is the fact that the principle enunciated in the Waugh case and relied upon by the defendants as having such tremendous impact as to foreclose the subject was not cited as authority or precedent in the latter Hamilton case. In the Hamilton case, at page 258, the Supreme Court rejected flatly the argument that a substantial federal question was lacking, and stated, 'we are unable to say that every question that appellants have brought for decision is so clearly not debatable and utterly lacking in merit as

to require dismissal for want of substance.' The significant factor in Hughes v. Caddo, supra, is that the matter was decided by a three-judge court and dismissed for want of jurisdiction, and such procedure was not questioned by the Supreme Court in the affirmance. In the recent case, Pyeatte v. Board of Regents of the Univ. of Oklahoma, 102 F. S. 407, aff'd. 342 U. S. 936, a similar challenge in a like situation to a ruling of the Board of Regents was heard by a three-judge court and the matter was considered and denied upon the merits. The court considered and discussed the Hamilton case but did not dismiss peremptorily for want of jurisdiction. Frankly, under this state of the law, I do not find clear uniformity and consistency which to my mind forecloses automatically the position assumed here by the plaintiffs in their pleadings (Rok v. Legg, 27 F. S. 243; Acret v. Harwood, 41 F. S. 492). Because of my own difficulty in research it would be most hypocritical to state categorically and I am unable to say that the questions are foreclosed and not fairly open to debate, and thus deprive the plaintiffs upon uncertain grounds of the prescribed hearing."

It is therefore respectfully submitted that this Court has jurisdiction of this appeal.

Dated: June 21, 1954.

DANIEL F. MATHEWS,
Syracuse, N. Y.,
A Member of the United States Supreme Court.
Admitted Dec. 11, 1934.

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Appendix "A"

UNITED STATES DISTRICT COURT NORTHERN DISTRICT OF NEW YORK

EARL WEBB, AS PRESIDENT OF SIGMA TAU GAMMA, AN UNINCORPORATED Association, and all others similarly situated, and DELTA KAPPA, INC., PHI SIGMA EPSILON, ALUMNI ASSOCIATION OF IOTA OF ALPHA KAPPA KAPPA, INC., PI KAPPA SIGMA, DELTA SIGMA EPSILON SORORITY, ALPHA SIGMA TAU SORORITY, THETA SIGMA UPSILON SORORITY and ROGER MUELLER, as Interveners,

Plaintiffs,

vs.

STATE UNIVERSITY OF NEW YORK, WILLIAM S. CARLSON, President, CHARLES GARSIDE, BETTY HAWLEY DONNELLY, NORMAN S. GOETZ, FREDERICK F. GREENMAN, GEORGE E. HAYNES, DWIGHT MARVIN, EARLE J. MACHOLD, FRANK C. MOORE, JOSEPH J. MYLER, EDWARD N. SCHEIBERLING, HENRY D. SHERWOOD, and EMILY SMITH WARNER, comprising the Trustees of STATE UNIVERSITY OF NEW YORK,

Defendants

Civil Action No. 5063

Appearances: Clifford H. Searl, Esquire, Attorney for Earl Webb, as President etc.; Alumni Association of Alpha Kappa Kappa, Inc., Hotel Syracuse, Syracuse, New York.

Hancock, Dorr, Ryan & Shove, Esquires, Attorneys for intervening Plaintiff, Delta Kappa, Inc., 800 Hills Building, Syracuse, New York.

Kernan & Kernan, Esquires, Attorneys for Intervening Plaintiff, Phi Sigma Epsilon, First National Bank Building, Utica, New York.

Butterfield, Gibbs, Harrington & Bernhardt, Esquires, (Robert P. Harrington, Esquire, and Julien B. Erway, Esquire, of Counsel), Attorneys for Intervening Plaintiffs Pi Kappa Sigma; Delta Sigma Epsilon Sorority; Alpha Sigma Tau Sorority, Theta Sigma Upsilon Sorority; Roger Mueller, 1036 Ellicott Square, Buffalo 3, New York.

Nathaniel L. Goldstein, Attorney General of the State of New York; Wendell P. Brown, Solicitor General; John C. Crary, Jr., Assistant Attorney General; Irving I. Waxman, Counsel, State University; Ruth V. Iles, Associate Counsel, of Counsel, Attorney for defendants, The Capitol, Albany, New York.

Before Honorable J. T. Foley—D. J.

Opinion—Decision

The amended complaint herein is filed in behalf of "Earl Webb, as President of Sigma Tau Gamma, a voluntary unincorporated association, and all others similarly situated." This pleading describes the plaintiff as a citizen of the United States and a resident of the State of Missouri and the duly elected and acting President of Sigma Tau Gamma, a social fraternity of male students, having chapters at forty-five colleges and universities throughout the United States. The defendant, State University of New York, is described as a corporation created by and existing under the laws of the State of New York, and empowered by the legislature of the State of New York through its governing board of trustees, the individual defendants named, to generally manage and regulate certain institutions of college level within the State of New York (Article 8 of the Education Law of New York, as added by Chapter 695 of the Laws of New York, 1948, as amended).

It is alleged that by enactment of such pertinent law, the State University of New York, and the trustees, were made responsible for the planning, supervision and management of higher educational facilities, supported in whole or in part by state moneys. Under the original law and

amendments thereto, the defendants were granted the management of some twenty-nine colleges, together with such colleges as might thereafter come under their jurisdiction. The powers delegated to effectuate the legislative purposes were broad and comprehensive. In several of these institutions which by law came within the province and jurisdiction of this State University, the plaintiff had previously, and apparently to the present time, chapters of its national fraternal association.

The main charge of the complaint goes to a resolution of the Board of Trustees, adopted October 8, 1953, allegedly upon the presentation of such resolution by its President, William S. Carlson. The resolution duly adopted states:

> "Resolved that no social organization shall be permitted in any state-operated unit of the State University which has any direct or indirect affiliation or connection with any national or other organization outside the particular unit; and be it further
>
> "Resolved that no such social organization, in policy or practice, shall operate under any rule which bars students on account of race, color, religion, creed, national origin or other artificial criteria; and be it further
>
> "Resolved that the President be, and hereby is, authorized to take such steps as he may deem appropriate to implement this policy, including the determination of which student organizations are social as distinguished from scholastic or religious, and his decision shall be final."

Inasmuch as the plaintiff alleges that it does not discriminate to any extent in the selection of its members, the gravamen of the complaint is directed against the first paragraph of the aforesaid resolution, with slight attack on the last paragraph as granting to the President unreasonable, dictatorial, discriminatory and unjust power.

The complaint is most voluminous, and would not be considered, in my judgment, a model pleading for conciseness. By important amendment, consented to by the defendants, an allegation was added based upon the jurisdictional pro-

visions of Section 1343, Title 28, U. S. C. A., as related to the claimed violations of the civil rights provisions of Section 1983, Title 42, U. S. C. A. Declarative and injunctive relief prayed for in the complaint is based generally upon constitutional grounds in that the provisions of the resolution and their intended purpose and effect are violative of the constitutional rights of the plaintiff as embodied in the First Amendment, particularly in reference to freedom of assembly; the provisions of the Fourteenth Amendment, with particular reference to the due process clause in that there was failure to grant a hearing and the content and method of passage thereof is discriminatory, arbitrary and capricious; the provision of Article I, Section 10, in that existing contract rights are breached. By another important amendment to the original complaint an interlocutory and permanent injunction, after a hearing by a three-judge court is now requested to annul the aforesaid resolution of October 8, 1953.

A motion to dismiss the original complaint had been filed in behalf of the defendants based upon stated grounds to dismiss for lack of jurisdiction in the court, and for failure to assert a claim upon which relief could be granted. The amended complaint is now subject to such motion. Procedural confusion was caused by the uncertainty of the plaintiff as to the need for a three-judge court to decide the merits of the controversy. However, that uncertainty vanished when the mandatory provision of Section 2281, Title 28, U. S. C. A. in relation to injunctive relief against state officers was realized, and the plaintiff thereafter filed a formal application with me for the convening of a three-judge court, the procedure for such call being provided for in Section 2284, Title 28, U. S. C. A. It is now agreed by both sides that the merits, if reached, must be decided by a three-judge statutory court.

As the dust was settling, on the scene came eight (as I count them, the State refers to six in its reply brief) new interveners, and such parties were allowed to intervene and file pleadings with the express consent of the defendants. One, Pi Kappa Sigma is an unincorporated association like the original plaintiff. Four, Phi Sigma Epsilon, Delta

Sigma Epsilon, Alpha Sigma Tau and Theta Sigma Upsilon are foreign corporations. Interveners Alumni Association of Iota of Alpha Kappa Kappa, Inc. and Delta Kappa, Inc. are New York corporations. Roger Mueller is a student at Buffalo Teachers College and a member of Sigma Tau Gamma, previously described. All these intervening plaintiffs, by their pleadings in intervention, attach themselves to the complaint of the original plaintiff with the statement that their rights are almost identical, that each will suffer irreparable injury from the effects of the resolution, and ask for the same relief prayed for in the amended complaint of the original plaintiff. It is evident that the intervention of certain of these parties, particularly the four foreign corporations with their diversity of citizenship and the individual asserting violation of his civil rights raise a conglomeration of jurisdictional problems, perplexing as to whether they may add new hinges in support of jurisdiction (Section 1331, Title 28 U. S. C. A., 1332 (a) (2), 1343 (3)) and may be considered to aggregate the necessary jurisdictional amount.

To each of these intervening pleadings or complaints, the defendants filed separate motions to dismiss similar to the motion filed against the original complaint. The stated grounds for lack of jurisdiction of the subject matter, specifically challenge the presence of substantial questions in relation to deprivation of civil rights, the same presence of substance in relation to matters arising under the constitution, laws and treaties of the United States. It is specifically traversed that the matter in controversy exceeds the value of $3,000.00 exclusive of interest and costs, and the failure of diversity is urged as a ground for dismissal when it applies to the status of the particular party as an unincorporated association, New York corporation or individual citizen of New York. I outline these factors to indicate the variety and complexity of the jurisdictional problems presented.

Despite these intricate questions, the first business at hand for me to decide is the necessity for the convening of a three-judge court, ordinarily necessary because of the injunctive relief prayed for against a state official body (Title 28 U. S. C. A. 2281). In a strong, able and persuasive

brief, the representatives of the State of New York contend that the constitutional claims posed in behalf of all plaintiffs are plainly unsubstantial because of previous holdings in the Supreme Court of the United States on similar matters. From that premise, with the further assumption that the pleadings establish no other ground of federal jurisdiction, it is logically urged that the upholding of such argument would necessarily obviate the convening of a three-judge court.

The principles in regard to the convening of a court of three judges have been clearly stated but are not too simple in application. In California Water Service Co. v. City of Redding, 304 U. S. 252, 254, "It is therefore the duty of a district judge to whom an application for an injunction restraining the enforcement of a state statute or order is made, to scrutinize the bill of complaint to ascertain whether a substantial federal question is presented, as otherwise the provision for the convening of a court of three judges is not applicable." (Citing Ex Parte Buder, 271 U. S. 461, 467; Ex Parte Poresky, 290 U. S. 30).

Then again in Ex Parte Poresky, supra, "The existence of a substantial question of constitutionality must be determined by the allegations of the bill of complaint * * * The question may be plainly unsubstantial, either because it is 'obviously without merit' or because 'its unsoundness' so clearly results from the previous decisions of this court as to foreclose the subject and leave no room for the interference that the question sought to be raised can be the subject of controversy." (Citing cases.)

However, in these authorities, imposing the duty of search and scrutiny by the district judge for a substantial federal question in the complaint, it is emphasized that only "*in the absence of diversity*" and when "*no other ground of jurisdiction appears*" does the district judge clearly have the right to dismiss for want of jurisdiction because no substantial question is presented (Emphasis mine) (Ex Parte Poresky, supra; Poresky v. Ryan, 82 F. (2d) 311, cert. den. 298 U. S. 654). A recent decision does establish that diversity of citizenship alone may confer jurisdiction, although it does not follow that such jurisdiction must be exercised

(Alabama v. Southern Ry. Co., 341 U. S. 341, 344-5). Also in Ex Parte Poresky, supra, and in Stratton v. St. Louis S. W. Ry., 282 U. S. 10, 15, it is pointed out that a single judge is not authorized to dismiss the complaint on the merits whatever his opinion might be.

Despite such feeling, the main attack upon substantiality because of previous federal decisions should be discussed. The defendants rely upon the opinions of the Supreme Court in Waugh v. Board of Trustees of the Univ. of Miss., 237 U. S. 589 and Hamilton v. Regents of the Univ. of Calif., 293 U. S. 245. Also, the opinion in Hughes v. Caddo Parish School Board, 57 F. S. 508, affirmed by the Supreme Court 323 U. S. 685 in a memorandum-decision based solely on the authority of Waugh v. Board of Trustees of the Univ. of Miss., supra.

It cannot be seriously questioned that the decisions are close in fact and law to the situation here. As in all legal controversies, arguable and debatable distinctions may be made legally and factually from the situation now presented by the complaint herein. Most significant, however, is the fact that the principle enunciated in the Waugh case and relied upon by the defendants as having such tremendous impact as to foreclose the subject was not cited as authority or precedent in the later Hamilton case. In the Hamilton case, at page 258, the Supreme Court rejected flatly the argument that a substantial federal question was lacking, and stated, "we are unable to say that every question that appellants have brought for decision is so clearly not debatable and utterly lacking in merit as to require dismissal for want of substance." The significant factor in Hughes v. Caddo, supra, is that the matter was decided by a three-judge court and dismissed for want of jurisdiction, and such procedure was not questioned by the Supreme Court in the affirmance. In a recent case, Pyeatte v. Board of Regents of the Univ. of Oklahoma, 102 F. S. 407, aff'd 342 U. S. 936, a similar challenge in a like situation to a ruling of the Board of Regents was heard by a three-judge court and the matter was considered and denied upon the merits. The court considered and discussed the Hamilton case but did not dismiss peremptorily for want of jurisdiction. Frankly, under this state of the law, I do not find clear uniformity and con-

sistency which to my mind forecloses automatically the position assumed here by the plaintiffs in their pleadings (Rok v. Legg, 27 F. S. 243; Acret v. Harwood, 41 F. S. 492). Because of my own difficulty in research, it would be most hypocritical to state categorically and I am unable to say that the questions are foreclosed and not fairly open to debate, and thus deprive the plaintiffs upon uncertain grounds of the prescribed hearing.

I am fully cognizant of the extreme burden placed upon the federal judiciary by the convening of a three-judge court and realize it should not be lightly extended (Oklahoma Gas & Electric Co. v. Packing Co., 292 U. S. 386, 391). I have also considered the line of authorities which warn against federal interference with state acts, but feel such discretionary decision should be left to the three judges (Railroad Comm. v. Pullman Co., 312 U. S. 496, 500, 501; Stainback v. Mo Hock Ke Lok Po, 336 U. S. 368; Alabama v. Southern Ry. Co., supra; East Coast Lumber Terminal v. Town of Babylon, 174 F (2d) 106).

Finally, if I am in error, it seems that the three judges once convened have the power to correct the situation either directly or indirectly (Osage Tribe of Indians v. Ickes, 45 F. S. 179; Norumbega Co. v. Bennett, 3 F. S. 500, 502, reversed 290 U. S. 598).

Because of the additional jurisdictional claims presented, involving civil rights, diversity, aggregation of interests, and because I am unable to say with certainty there are not constitutional problems presented of substance and importance, which are not arguable because of previous judicial decisions and interpretations, I shall grant the application of the plaintiff for the convening of a three-judge court and shall set the machinery in motion as prescribed in 28 U. S. C. A. 2284. I hold there is sufficient present to warrant such action, and I defer and reserve the motions to dismiss filed by the defendants upon particular grounds stated therein for the consideration and decision of the statutory court, and it is so ordered.

JAMES T. FOLEY,
United States District Judge.

Dated: Albany, New York, April 27, 1954.

Appendix "B"

UNITED STATES DISTRICT COURT, NORTHERN DISTRICT OF NEW YORK

EARL WEBB, as President of SIGMA TAU GAMMA, an unincorporated Association, and all others similarly situated, and DELTA KAPPA INC., PHI SIGMA EPSILON, ALUMNI ASSOCIATION OF IOTA OF ALPHA KAPPA KAPPA, INC., PI KAPPA SIGMA, DELTA SIGMA EPSILON SORORITY, ALPHA SIGMA TAU SORORITY, THETA SIGMA UPSILON SORORITY and ROGER MUELLER, as Intervenors,

Plaintiffs,

against

STATE UNIVERSITY OF NEW YORK, WILLIAM S. CARLSON, President, CHARLES GARSIDE, BETTY HAWLEY DONNELLY, NORMAN S. GOETZ, FREDERICK F. FREEMAN, GEORGE E. HAYNES, DWIGHT MARVIN, EARLE J. MACHOLD, FRANK C. MOORE, JOSEPH J. MYLER, EDWARD N. SCHEIBERLING, HENRY D. SHERWOOD, and EMILY SMITH WARNER, comprising the Trustees of State University of New York,

Defendants

Before: AUGUST N. HAND, Circuit Judge, and STEPHEN W. BRENNAN, and JAMES T. FOLEY, District Judges

Clifford H. Searl, Attorney for Earl Webb and Alumni Association Iota of Alpha Kappa Kappa, Inc.

Hancock, Dorr, Ryan & Shove, Attorneys for Delta Kappa, Inc.

Kernan & Kernan, Attorney for Phi Sigma Epsilon.

Butterfield, Gibbs, Harrington & Bernhardt, Attorneys for Pi Kappa Sigma, Delta Sigma Epsilon Sorority, Alpha Sigma Tau Sorority, Theta Sigma Upsilon Sorority and Roger Mueller; Robert P. Harrington and Julian B. Erway, of counsel.

Nathaniel L. Goldstein, Attorney General of the State of New York, Wendell P. Brown, Solicitor General, John C. Crary, Jr., Assistant Attorney General, Irving I. Wax-

man, counsel, and Ruth V. Illes, associate counsel, for State University.

Albert S. Bard, Counsel for National Inter-Fraternity Conference and the National Panhellenic Conference, Amici Curiae.

AUGUST N. HAND, Circuit Judge:

The plaintiffs and intervenors, as members and affiliates of national fraternities and sororities, seek to void the resolution adopted by the Board of Trustees of the State University of New York on October 8, 1953. The resolution in effect bans social organizations having a direct or indirect affiliation with any national or other organization outside the particular unit of the State University where such social organization is located. The resolution in its entirety is quoted below.* Since the local chapters will have to forego affiliation with the national organization of their fraternity or sorority if they wish to continue functioning at the state units, the plaintiffs claim that the resolution deprives them of their civil rights. Specifically they charge that the resolution was adopted without due process of law, encroaches on their freedom to assembly, denies them equal protection of the law, and adversely affects existing contract rights. Accordingly, a judgment is sought declaring the resolution unconstitutional and enjoining its enforcement. Jurisdiction to pass on this question is founded both under 28 U. S. C. § 1331 and 28 U. S. C. § 1343 (3) as a deprivation of civil rights under 42 U. S. C. § 1983 is alleged.

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* "RESOLVED that no social organization shall be permitted in any state-operated unit of the State University which has any direct or indirect affiliation or connection with any national or other organization outside the particular unit; and be it further

"RESOLVED that no such social organization, in policy or practice, shall operate under any rule which bars students on account of race, color, religion, creed, national origin or other artificial criteria; and be it further

"RESOLVED that the President be, and hereby is, authorized to take such steps as he may deem appropriate to implement this policy, including the determination of which student organizations are social as distinguished from scholastic or religious, and his decision shall be final."

Since the validity of the action of a state agency functioning under state statutes is involved, a three judge court was convened pursuant to 28 U. S. C. § 2281. Webb v. State University of New York, Civ. Act. No. 5063 (N. D. N. Y., April 27, 1954).

At the hearing plaintiffs introduced evidence to show the beneficial aspects of national affiliation, the lack of discriminatory clauses in their constitutions, and generally the relationship between the national organization and the local chapters. Testimony was introduced to the effect that no notification of the pending resolution or a chance for a hearing was given. However, we find little merit in the numerous contentions made by the plaintiffs as it is clear that the constitutionality of the action taken here cannot be questioned. A state may adopt such measures, including the outlawing of certain social organizations, as it deems necessary to its duty of supervision and control of its educational institutions. See Waugh v. Mississippi University, 237 U. S. 589; Hughes v. Caddo Parish School Bd., 57 F. Supp. 508, (W. D. La.) affirmed 323 U. S. 685; cf. Hamilton v. Regents, 293 U. S. 245. Moreover, the incidental effect of any action or policy adopted upon individuals or organizations outside the university is not a basis for attack. Pyeatte v. Board of Regents, 102 F. Supp. 407, (W. D. Okla.) affirmed 342 U. S. 936. The plaintiffs have cited no authority contrary to these decisions and since we consider them controlling in the case before us, further discussion becomes unnecessary.

Plaintiffs argue that they were not notified of the pending action, but lack of notice and hearing before adoption of a resolution by an administrative body is not a denial of due process where legislative action of a prospective nature is taken under a valid delegation of powers from the legislature. See Willapoint Oysters v. Ewing, 174 F. 2d 676, 694, (9th Cir.,) cert. den. 338 U. S. 860. Moreover, the Board of Trustees seems clearly within its supervisory powers, see Educational Law, § 355, in making the decision that social organizations, other than strictly local autonomous ones subject without question to local control by the

University, are detrimental to the educational environment at units of the State University.

Accordingly, we find that plaintiffs here have not shown that they have been deprived of any civil rights. Since the Resolution adopted by the Board of Trustees does not encroach on any constitutional rights, the action is dismissed.

Judgment for the defendants.

AUGUST N. HAND,
U. S. C. J.

STEPHEN W. BRENNAN,
U. S. D. J.

JAMES T. FOLEY,
U. S. D. J.

June, 1954.

Original filed June 7, 1954, G. A. Porter, Clerk.